STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Brian K. Zahra, Janet T. Neff and Jessica R. Cooper

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

MARK JOSEPH ANSTEY,

Defendant-Appellee.
_____/

Supreme Court No. 128368

Court of Appeals No. 255416

Lower Court No. 03-411091SD

BERRIEN COUNTY PROSECUTOR
Attorney for Plaintiff-Appellant

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DEFENDANT-APPELLEE'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

MICHIGAN COURT RULE

PUBLIC ACTS

STATEMENT OF QUESTIONS PRESENTED

I. **WHEN A POLICE OFFICER MADE A CONSCIOUS CHOICE NOT TO HONOR DEFENDANT'S REASONABLE REQUEST FOR AN INDEPENDENT CHEMICAL TEST ADMINISTERED BY A PERSON OF HIS CHOOSING, DID THE TRIAL COURT PROPERLY DISMISS THE CASE? DID THE LEGISLATURE INTEND MCL 257.625a(6)(d) TO PROTECT A DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE, AND WAS NO REMEDY SHORT OF DISMISSAL CONSISTENT WITH THAT INTENT UNDER THE FACTS OF THIS CASE?**

Trial Court answers, "Yes."

Court of Appeals answers, "Yes."

Defendant-Appellant answers, "Yes."

SUMMARY OF THE ARGUMENT

After a police officer deliberately deprived Mark Anstey of his constitutional and statutory right to an independent chemical test by a person of his choosing, the circuit court dismissed the Operating Under the Influence of Liquor (OUIL) charge.

While the text of the statute at issue in this appeal does not specify a remedy for its violation, dismissal was the proper remedy under the facts of this case because it is the remedy that reflects the purpose and intent of the Legislature and because it is the only remedy that could alleviate the harm to Mr. Anstey after he was deprived of the due process right to present the one defense open to him.

People v Koval, 371 Mich 453 (1963), and the many Court of Appeals cases that follow *Koval* were correctly decided. These cases do not mandate dismissal as the sole remedy for a violation of MCL 257.625a(6)(d). However, dismissal is the appropriate remedy when a trial court, in the sound exercise of its discretion, finds that the police have acted in bad faith to prevent a defendant from obtaining evidence material to his defense.

What the prosecution is asking this Court to do is allow it to reap the benefits of police misconduct by proceeding with its own case after police have destroyed any reasonable possibility of a defense case. Neither the Due Process Clause nor the statute permits this result.

COUNTER-STATEMENT OF FACTS

Defendant-Appellee Mark Anstey accepts the Plaintiff-Appellant's Statement of Facts with the following additions:

At the June 27, 2003, hearing on the Motion to Suppress/Dismiss, Officer Shane Daniel testified that he offered to take Mr. Anstey to the Saint Joseph Medical Center, and he provided the following explanation for why he was willing to take Mr. Anstey to the Saint Joseph Medical Center but not to Watervliet Community Hospital, which Mr. Anstey had specifically requested:

> After I told him I would not take him to Water—Watervliet due to the fact that Saint Joe Medical Center is the closest proximity to the hospital and *we are very familiar with the procedures at that hospital. We routinely take people to Saint Joe Medical Center . . .*

(23a; emphasis added.)

At the same hearing, Mr. Anstey denied that Officer Daniel, or any police officer, offered to take him to Saint Joseph, but Mr. Anstey also said that he knew the police would have taken him there because it was "standard procedure" for the police to go there. As Mr. Anstey explained, that was the very reason he believed he would not get a truly independent test at the Saint Joseph Medical Center:

> I know that is the umm, *that's the facility that normally the Sheriff's Department would use and that's their testing facility. I wanted an independent test* where I can deal with my own—my own testing.

(37a; emphasis added.)

I. WHEN A POLICE OFFICER MADE A CONSCIOUS CHOICE NOT TO HONOR DEFENDANT'S REASONABLE REQUEST FOR AN INDEPENDENT CHEMICAL TEST ADMINISTERED BY A PERSON OF HIS CHOOSING, THE TRIAL COURT PROPERLY DISMISSED THE CASE. THE LEGISLATURE INTENDED MCL 257.625a(6)(d) TO PROTECT A DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE, AND NO REMEDY SHORT OF DISMISSAL WAS CONSISTENT WITH THAT INTENT UNDER THE FACTS OF THIS CASE.

Standard of Review

Defendant Anstey agrees with the prosecution that questions of law are reviewed *de novo,* including interpretations of the language of a statute. *People v Webb,* 458 Mich 265, 274 (1998). The prosecution argues in its brief to this Court that the remedy for the violation of a statute must come from the Legislature, but concedes that the text of MCL 257.625a(6)(d)[1b-3b] does not address the question of remedy. There must be a remedy, however, because it is beyond dispute that the Michigan Legislature does not intend that its statutes be unenforceable. This Court has said that "it is not uncommon for the Legislature to leave the task of devising a remedy to the judiciary." *People v Crawford,* 429 Mich 151, 159 (1987).[1] That is in fact what the Legislature did with MCL 257.625a(6)(d), and, consistent with decades of prior appellate decisions, the Court of Appeals in Mr. Anstey's case upheld the remedy of dismissal imposed by the trial court, recognizing that when the police "wholly fail to allow the suspect to obtain his or

[1] This Court has said the same thing in the civil context. In *Gardner v Wood,* 429 Mich 290, 302 n5 (1987), for example, the Court said:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord . . . a right of action.

her own independent chemical test, dismissal of the attendant charges is the appropriate remedy." (110a.) The Michigan Legislature has empowered trial courts to fashion a remedy for violations of MCL 257.625a(6)(d) as long as that remedy reflects legislative intent. Therefore, the standard of review is abuse of discretion, and the test is whether an unprejudiced person, considering the facts on which the trial court relied in reaching its decision, "would conclude that there was no justification for the ruling." *People v Briseno,* 211 Mich App 11, 14 (1995).

A. MCL 257.625a(6)(d) EXISTS TO PROTECT A DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

A defendant in a criminal case has the right to present a defense under US Const, Am XIV; Const 1963, art 1, §17. *Chambers v Mississippi,* 410 US 284, 294; 93 S Ct 1038; 35 L Ed 2d 297 (1973); *People v Carpenter,* 464 Mich 223, 241-242 (2001). This right is fundamental to due process. "[T]he right to present the defendant's version of the facts as well as the prosecutor's to the jury so it may decide where the truth lies" is in fact at the very heart of the due process right. *Washington v Texas,* 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967), quoted in *People v Hayes,* 421 Mich 271, 278-279 (1985). While a limitation on a defendant's ability to present evidence relevant to his defense may violate due process, the right to present a defense is not absolute. A defendant is required to comply with procedural and evidentiary rules designed to assure a fair trial and a reliable verdict. *Chambers v Mississippi* at 410 US 294; *People v Hayes* at 279. Here, it was not Defendant Anstey who failed to comply with a statute designed to assure equal access to evidence and thus also ensure the due process right to present a defense and achieve a fair and reliable verdict. Rather, it was the police who failed to comply with a statute that exists to implement constitutional guarantees.

The prosecutor seems to acknowledge the constitutional dimension of the issue before this Court when he asks the Court to analogize to cases addressing loss or destruction of evidence and apply to Mr. Anstey's case the test that the United States Supreme Court adopted in *Arizona v Youngblood,* 488 US 51; 109 S Ct 3331; 102 L Ed 2d 281 (1988) for such violations. Defendant Anstey joins in that request because *Youngblood* establishes that the error in this case was constitutional.

Before considering *Youngblood,* one must review the predecessor case of *California v Trombetta,* 467 US 479; 104 S Ct 2528; 81 L Ed 2d 413 (1984), in which the Court held that the Due Process Clause of the Fourteenth Amendment does not require police to preserve breath samples in order to introduce breath-analysis tests at trial. In so holding, the Court acknowledged that under the Due Process Clause criminal prosecutions must comport with "prevailing notions of fundamental fairness," which means that defendants must "be afforded a meaningful opportunity to present a complete defense. To safeguard that right the Court has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence.'" 467 US 485. Among "rudimentary" constitutionally protected rights is the right of a defendant to request and obtain from the prosecution evidence that is material to the defendant's guilt or innocence. *Id.*

In *Arizona v Youngblood,* the Court went further in considering "the area of constitutionally guaranteed access to evidence." 488 US 55. The Court held that prosecutorial suppression or failure to preserve material evidence favorable to the accused violates due process regardless of the good or bad faith of the prosecution. When the evidence is not clearly favorable, but only *potentially* favorable or useful to the defense, the Due Process Clause is violated only where the prosecution or police acted in bad faith. 488 US 57-58. Contrary to the

prosecutor's assertion in this case that Office Daniel simply "guessed wrong" as to his professional obligation (Appellant's brief at 16), Officer Daniel acted deliberately to deprive Defendant Anstey of an independent test administered by a person of his choosing. Officer Daniel was not negligent, he was not reckless, he was not innocently ignorant of his duty. He was calculating, and the record reflects that fact. A calculated decision to deprive the accused of the independent test to which he is constitutionally and statutorily entitled is the very essence of bad faith. The officer testified at the evidentiary hearing that he would not take Mr. Anstey to the facility Mr. Anstey requested. *The officer* chose Saint Joseph Medical Center instead, not only because it was slightly closer,[2] but because the police "are very familiar with the procedures" there and routinely take people to that particular hospital. (23a.) That was, of course, exactly why Mr. Anstey concluded that it would be impossible for him to get a truly independent test at that facility. (37a.) It was why the Court of Appeals concluded: "Defendant was not required to accept transportation to an independent facility of the officer's choice; he had the right to select a facility within reason." (110a.) Officer Daniel did not and could not testify that Defendant Anstey's request to go to Watervliet Hospital was unreasonable because he could not have known whether or not it was unreasonable. The officer twice testified that he simply did not know how long it might have taken him to drive to Watervliet Hospital. (26a, 30a.)

In the circuit court, Judge Butzbaugh acknowledged the due process genesis of the rule. In rejecting the prosecutor's argument that only a statutory violation occurred here, the judge said:

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[2] While the prosecutor has told this Court that the issue before it involves the officer's refusal to take Mr. Anstey "to distant locations" for independent testing (Appellant's brief at 8), the record reflects that the Saint Joseph Medical Center was approximately one and one-half miles away from the jail (23a, 31a) and that Watervliet Hospital was a ten to fifteen minute drive from the jail (38a).

> Certainly, a due process constitutional issue is implicated under this fact scenario, especially since it relates to perishable evidence, an accused's blood alcohol level at a given time. The Legislature responded to the due process issue by mandating the statutory chemical test rights in § 625a(6)(d). This is a statute imposed due process right.
>
> When an accused consents to a breathalyzer, which is required to trigger a statutory second test by a person of the accused's choice, there then exists evidence of the accused's blood alcohol level, the first test taken by the police. An accused has a statutory right to those test result under § 625a(8), exculpatory or not. The purpose of the statute is not to give an accused access to exculpatory evidence; that evidence and that right already exist. The purpose is to give an accused the right to a test by a person of his choosing. That is, a test "independent" of the arresting police officer. Whether or not that rises to constitutional protection is not important here, because it is the due process protection expressly granted by the statute. Neither party has cited constitutional authority, other than the cases noted herein. A constitutional analysis is not required, since the statutory remedy is clear.

(Circuit Court Opinion, 102a-103a.)

As this Court, the Court of Appeals and the trial court have recognized, a statutory violation may rise to the level of a constitutional violation. See *People v Sobczak-Obetts,* 463 Mich 687, 707-708 (2001). See also *People v Burton,* 13 Mich App 203, 207 (1968), where, in referring to a violation of the statute at issue, the Court of Appeals said: "There is respectable authority for the proposition that a person is deprived of due process of law when he is denied a reasonable opportunity, under the circumstances, to obtain a timely sample of blood at his own expense."

B. DISMISSAL WAS THE APPROPRIATE REMEDY, EVEN UNDER THE PROSECUTION'S NON-CONSTITUTIONAL ANALYSIS. WHEN THE TEXT OF A STATUTE IS SILENT AS TO THE REMEDY FOR ITS VIOLATION, A TRIAL COURT MUST GIVE PRIMARY CONSIDERATION TO THE LEGISLATIVE LANGUAGE, HISTORY AND PURPOSE AND THEN IMPOSE THE LEAST SEVERE SANCTION CAPABLE OF ALLEVIATING THE HARM TO THE DEFENDANT. DISMISSAL IS THE REMEDY MOST CONSISTENT WITH THE PURPOSE OF THE STATUTE AND THE INTENT OF THE LEGISLATURE, AND

IT IS THE REMEDY BEST DESIGNED TO ALLEVIATE THE HARM TO MR. ANSTEY UNDER THE FACTS OF THIS CASE.

The prosecution and defense agree, as they agreed previously in both the trial court and the Court of Appeals, that MCL 257.625a(6)(d) provides no explicit remedy for its violation. The prosecutor argues that a court cannot prescribe a remedy for a statutory violation unless that remedy exists in the statute itself. (See Appellant's brief at 8-14.) The prosecutor relies on language from this Court that the "judicial role precludes imposing different policy choices than those selected by the Legislature, [and] our obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the words expressed in the statute." *People v McIntire,* 461 Mich 147, 152 (1999). The prosecutor further relies on this Court's observation that inferring legislative intent not indicated in the statutory text "would be an exercise of *will* rather than *judgment*." *People v Stevens (After Remand),* 460 Mich 626, 645 (1999) [emphasis in original].

In support of his argument that only the Legislature can determine the remedy for a statutory violation, the prosecutor cites a number of decisions from this Court dealing with the question of whether the remedy of suppression is appropriate for a charged statutory violation involving a search question, but *not* involving a violation of the Fourth Amendment. See *People v Hawkins,* 468 Mich 488 (2003) [affidavit inadequate for issuance of warrants under MCL 780.653 and MCR 3.606(A)]; *People v Hamilton,* 465 Mich 526 (2002), *overruled in part by Bright v Littlefield,* 465 Mich 770 (2002) [police make drunk driving arrest outside jurisdiction in violation of MCL 764.2a]; *People v Sobczak-Obetts, supra,* [police fail to leave copy of affidavit in support of warrant at scene during execution of search in violation of MCL 780.654

and .655]; *People v Stevens (After Remand),* 460 Mich 626 (1999) [police fail to comply with "knock and announce" requirement in violation of MCL 780.656].[3]

What the above-cited cases say is that the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *People v Steven (After Remand) supra* at 640, quoting *Illinois v Krull,* 480 US 340, 347; 107 S Ct 1160; 94 L Ed 2d 364 (1987). Because suppression of evidence as a remedy is based on Fourth Amendment violations, it does not apply to non-constitutional violations minus a clear legislative intent that it do so. *People v Wood, supra* at 410; *People v Hawkins, supra* at 500. Or, as this Court said in *Bright v Littlefield, supra* at 590, n5, there is no exclusionary rule requiring suppression of evidence that is "statutorily illegal," but which does not violate the Fourth Amendment. Because the charged statutory violations in the above cases did not render the police actions unconstitutional, this Court declined to make the policy choice of applying the exclusionary rule as a remedy for the non-constitutional statutory violations minus an indication of a legislative intent to do so.

Because Mr. Anstey's case does not involve application of the exclusionary rule to a non-constitutional, non-Fourth Amendment, "merely statutory" violation, the cases on which the prosecution relies provide no assistance in resolving the issue before this Court. But, oddly, after stretching to try to show how the above cases *are* applicable to the issue, the prosecutor

[3] The prosecutor relies on the additional case of *Jones v Department of Corrections,* 468 Mich 646 (2003), which addresses whether the DOC's failure to hold a parole revocation hearing within 45 days as required by MCL 791.240a(1) entitles a defendant to release from prison. Unlike the above-cited cases, *Jones* does not involve a search and seizure question or the remedy of suppression. While this Court did say at page 722 that it was not its function to make policy choices as to remedy different from those made by the Legislature, it did so in the context of finding that the Legislature has specified an order of mandamus as the appropriate remedy where the DOC fails to act timely.

repudiates his entire argument by concluding, as he concluded earlier in both the trial court and the Court of Appeals, that the appropriate remedy is *suppression* of the police chemical test results. In section C of his brief to this Court, the prosecutor concedes that the remedy of suppression "finds no support in the statute," but then says that the trial court should have imposed it anyway because it is a remedy "more narrowly tailored to the violation." (Appellant's brief at 17.) He argues that with suppression as the remedy, the arresting officer could have testified as to his observations of Mr. Anstey, conceivably permitting the prosecutor, on that evidence alone, to make the case for an OUIL conviction. (Appellant's brief at 19.)

Further, the prosecutor asks this Court to analogize to *People v Spencley,* 197 Mich App 505, 508 (1992), where the Court of Appeals held that the remedy for an illegal OUIL arrest was not dismissal, but suppression of the evidence that flowed from that arrest. However, *Spencley* provides no support for the prosecutor's position either because what the Court of Appeals said was that if the police obtained sufficient evidence *prior* to making the illegal arrest, it could use that non-tainted evidence to proceed with a criminal charge against the defendant. The appropriate remedy when evidence is derived from an illegal arrest is the suppression of that evidence under the well-established "fruit of the poisonous tree" doctrine of *Wong Sun v United States,* 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). The "fruit of the poisonous tree" doctrine, and it remedy of suppression, can hardly be analogized to this case. This case does not involve a question of severing tainted from untainted evidence. Rather, it involves the best way to protect the statutory right of a person who accedes to a police request for chemical testing to then have honored his own reasonable request and opportunity for further testing by a person of his choosing.

The prosecutor argues that imposition of a remedy that "finds no support in the statute" exceeds judicial authority. He concedes that the remedy of suppression finds no support in the statute. He nonetheless argues for suppression as the remedy because *he* has determined that it is a "better" or "narrower" judicial remedy than dismissal. His conclusion is at odds with the basic premise of his brief.

Defendant Anstey suggests a different approach to the problem, one that has the advantage of internal consistency:

While it is true that this Court must begin by examining the language of MCL 257.625a, *People v Phillips,* 469 Mich 390, 395 (2003), it is equally true that the text of this particular statute does not specify a remedy for its violation. That being the case, this Court must attempt "to ascertain and give effect to the intent of the Legislature." *People v Pasha,* 466 Mich 378, 382 (2002). The intent of the Legislature can be determined through a study of legislative history, statutory scheme and, most significantly, the purpose of the legislation at issue. Guided by these considerations, a court should impose the least severe sanction capable of alleviating the particular harm to the defendant. If a lesser sanction will alleviate the harm to the defendant, a more severe remedy is inappropriate. *People v Elston,* 462 Mich 751, 764 (2000).

1. The legislative history is scant.

Unfortunately, there is a dearth of legislative history pertaining to MCL 257.625a. The Legislature produces no histories as such, and it did not begin publishing Bill Analyses until 1973.[4] However, as the prosecutor correctly notes, we do know that the statute was enacted in 1948 and has been amended several times since then. The reciprocal chemical testing provision was added in the 1960 amendment. The prosecutor says that between 1960 and 1980, *any* person

[4] Per the Reference Librarian of the Library of Michigan.

charged with OUIL had the right to an independent chemical test, but that amendments of 1980 and 1982 removed that right. He concludes that the 1980 and 1982 amendments evidenced a legislative intent to narrow the circumstances under which an independent chemical test is allowed and, therefore, narrow the remedy as well, and that in construing *People v Koval,* 371 Mich 453 (1963), appellate courts have lost sight of the fact that the statute was very different in 1963 than it was after 1980. (Appellant's brief at 17-18.)

His conclusions are wrong because his facts are wrong. A study of the language of each public act, beginning with 1960, reveals that the defendant's right to a police-facilitated independent chemical test has always been contingent on the defendant first taking a police-initiated test. See Public Acts 1960, No 148; Public Acts 1964, No 104; Public Acts 1967, No 253; Public Acts 1971, No 154; Public Acts 1978, No 572; Public Acts 1980, No 515; Public Acts 1982, No 310.[5] (4b-19b.)

Further, a review of *all* available Legislative Analyses for this provision of the statute, including discussions of changes in language and purpose through years of amendments, reveals *not one sentence* supporting the prosecutor's argument that a change in legislative intent occurred in 1980 and 1982 relating to what is now MCL 257.625a(6)(d).[6]

There were both substantive and stylistic changes in language between 1960 and 1964. The 1960 version of the statute says that where the accused is told in writing and acknowledges in writing that he not required to consent to a chemical test and nonetheless provides his own written consent to chemical testing, the test results are admissible and give rise to certain presumptions that are spelled out in paragraph (1) (a) through (c). In paragraph (3), if all of this

[5] While there have been numerous amendments since 1982, they are not included here because MCL 257.625a(6)(d), or its numerical equivalent, remains essentially unchanged.
[6] The defense has reviewed hundreds of pages of public acts and analyses provided by the Library of Michigan.

happens ("as provided in this section") a person charged (as opposed to merely arrested) shall be permitted to have a physician of his choosing administer a chemical test, the results of which also are admissible if offered into evidence by the accused. (4b-5b.)

In the 1964 version of the statute, the Legislature deleted the various writing requirements found in paragraph (1) of the 1960 version, simply stating in (1) that chemical test results are admissible and give rise to the presumptions of sub-paragraphs (a)-(c). The Legislature shifted any further description of the police test from paragraph (1) to paragraph (3) and added the words: "who takes a chemical test administered under the direction of a police officer as provided in paragraphs (1) and (2) hereof, . . ." (6b-7b.) However, reading the 1960 and 1964 versions of section MCL 257.625a in their entireties, as required by the rules of statutory construction,[7] establishes that both versions describe a police-initiated test followed by the option of a defense-requested test. While there were substantive changes in the testing procedures between 1960 and 1964, the change the prosecutor describes as having occurred in 1980 or 1982, did not occur under *any* amendment of this section of the statute.

The obligation of the police to inform a defendant of his right to an independent test and provide him with a reasonable opportunity to have that test, regardless of whether the defendant first acceded to a police test, never existed under this statute and therefore has not been removed by subsequent amendments. That being the case, the remedy in *Koval* has not been rendered obsolete or inaccurate, as the prosecutor suggests. The Court of Appeals has said many times over the years that the statutory provision has remained essentially unchanged through its many

[7] Any one provision of a statute must be read in *pari materia* with its other provisions. In construing a statute, its language must be read in light of its general purpose, *People v Stoudemire,* 429 Mich 262, 265 (1987), and the statute must be construed to give force and effect to every word, phrase, clause and sentence of the provision. *People v Taravella,* 133 Mich App 515, 523 (1984).

amendments. See, for example, *People v Green,* 260 Mich App 392, 406 (2004); *People v Dicks,* 190 Mich App 694, 698-699 (1991). The Court of Appeals was correct.

2. The legislative purpose is effectuated by the remedy of dismissal.

The purpose of MCL 257.625a(6)(d) is to assure the defendant "a reasonable opportunity to gather competent evidence for his defense," *People v Burton,* 13 Mich App 203, 207 (1968). The power to gather blood alcohol evidence cannot be left solely to the prosecution. *People v Prelesnik,* 219 Mich App 173, 180 (1986), *overruled in part on other grounds in People v Wager,* 460 Mich 118, 123-124 (1999). Neither may the prosecution be allowed to frustrate a defendant's reasonable efforts to produce probative evidence. *People v Green, supra* at 406-407; *People v Burton, supra* at 207.

While dismissal as a remedy is generally disfavored, *People v Gallego,* 430 Mich 443, 454 (1988), it is the appropriate remedy where no lesser remedy can cure the error. Drunk driving cases are unique and warrant this unique remedy *for this particular violation* because once a motorist is accused of driving while intoxicated, there is a very small window of opportunity for rebutting the charge with competent evidence, and the ability to take advantage of that small window of opportunity is in the hands of the police rather than the accused once the accused has been placed under arrest.[8] The only real question in a case like this one is whether the accused was intoxicated at the time the police arrested him. To be able to mount any meaningful defense, the accused must be able to present evidence that he was not intoxicated or, at the very least, he must be able to discredit the prosecution's evidence that he was. Even if the prosecution presents "nonscientific" evidence, such as the observations of a trained police officer, or the results of field sobriety tests (walk a straight line, recite the alphabet, etc.), a

[8] The trial judge properly characterized the blood evidence as "perishable." (102a.)

defendant will be stymied in his attempt to present a defense if he is not afforded immediate access to his own blood for the purpose of independent chemical testing. There is no comparable evidence available to an accused and thus no alternative means of demonstrating innocence. The error cannot be remedied by suppression, because if after suppression the prosecutor relies on police testimony about what the police did or observed on the scene, the defendant will be equally deprived of an opportunity to present a defense. The error cannot be remedied by a new trial because the opportunity to gather defense evidence will have long since disappeared. [9]

Such was the situation in *People v Dungey,* 147 Mich App 83, 88 (1985), a fourth-degree criminal sexual conduct case in which the Court of Appeals found that dismissal was the only appropriate remedy where prosecution delay between the date of the offense and the date of arrest deprived the defendant of potentially exculpatory blood typing evidence. The Court of Appeals rejected the prosecution's argument that when "a heavy caseload" caused the delay, dismissal was unjustified. The court found that the secretion typing test offered the possibility of excluding the defendant from the class of suspects, and the prosecutor's delay and neglect made it impossible for the defense to obtain potentially exculpatory evidence. No other remedy could alleviate this harm. So, too, in *People v Piotrowski (*#251670; unpublished Court of Appeals opinion of May 19, 2005), where, citing the *Koval* directive that "respect for the statutory right [to an independent test] should be given willingly, and not reluctantly," the majority found that

[9] In *Schmerber v California,* 384 US 757; 86 S Ct 1826; 16 L Ed 2d 908 (1966), the Court held that a warrant was not required for a compelled blood test because delay might result in destruction of evidence of intoxication. The Court acknowledged that "in requiring petitioner to submit to the withdrawal and chemical analysis of his blood the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense." 384 US 761. The Court concluded, however, that drunk driving cases involve "special facts," and that the arresting officer in the case "might reasonably have believed that he was confronted with an emergency in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." 384 US 770-771. Such "special facts" in an OUIL case also apply to a *defendant's* need to obtain evidence quickly.

the conduct of the police in deliberately circumventing the defendant's attempts to have an independent test required dismissal. (22 b.)

Thus the narrowest remedy that could alleviate the harm to Mr. Anstey was dismissal. It is the remedy consistent with his constitutional right to present a defense and with the determination of the United States Supreme Court that when police exhibit bad faith in denying a defendant access to potentially exculpatory evidence, they violate the Due Process Clause. *Arizona v Youngbood, supra.*

C. *PEOPLE V KOVAL* WAS CORRECTLY DECIDED AND THE REMEDY OF DISMISSAL SHOULD BE RETAINED. *KOVAL* DID NOT, HOWEVER, CONTRARY TO THE PROSECUTOR'S CONTENTION, HOLD THAT DISMISSAL IS THE ONLY REMEDY FOR A VIOLATION OF MCL 257.625a(6)(d).

Defendant Anstey is at a loss to understand the prosecutor's argument to this Court that *People v Koval* not only makes dismissal the remedy, but makes it the *only* remedy for a violation of now-MCL 257.625a(6)(d), and that the trial court and the Court of Appeals adopted the same erroneous position. (See Appellant's brief at 17.) The fact that a court finds that dismissal is "the" remedy or "the appropriate remedy" in a particular case does not mean it is holding that dismissal is the remedy in every case involving some violation of the same statute.

Mr. Anstey argued in the first section of this brief that abuse of discretion is the correct standard of review because he recognizes that not every violation will *warrant* the remedy of dismissal. The Court of Appeals recognized the same thing when it said: "When the police administer a chemical test to a suspect, *but wholly fail to allow the suspect to obtain his or her own independent chemical test*, dismissal of the attendant charges is the appropriate remedy." (110a; emphasis added.) This is a far cry from holding that every violation of MCL 257.625a(6)(d) requires dismissal, and the language of the above sentence suggests our Court of

Appeals clearly understood that bad or good faith by police is an essential consideration in determining the appropriate remedy. Consider also *People v Dicks, supra,* where indisputably there was a violation of this statute, but suppression rather than dismissal was an appropriate remedy given that the accused acquiesced in a second test at a facility chosen by police and did not thereafter object to the test's accuracy. As to whether Judge Butzbaugh viewed dismissal as the exclusive remedy, one need look only to his April 20, 2004, opinion where he cited with approval language from case law referring to dismissal as "an appropriate remedy" (Opinion at 101a); stating that "dismissal of an OUIL charge may be appropriate" (Opinion at 101a); stating that a court "can dismiss the charges" (Opinion at 101a) and concluding that a "violation of the statutory mandate warrants dismissal" (Opinion at 103a). Neither "may," nor "can," nor "warrants" nor "an appropriate remedy" should be construed to mean that *every* violation of MCL 257.625a(6)(d) *requires* dismissal of the charges against the accused.

The prosecutor makes two additional attacks on Judge Butzbaugh's written opinion, which Mr. Anstey challenges here. The prosecutor argues that allowing Mr. Anstey to refuse to be tested at a facility of the police officer's choosing, and then granting dismissal of the charges, awarded Mr. Anstey "a windfall." (Appellant's brief at 12, 19.) Nothing could be further from the truth. It is hardly a "windfall" to be denied the protections of a statute that was "enacted for the protection and benefit of motorists," to ensure "that the scientific evidence shall not be at the sole disposal of either party," *People v Koval, supra* at 458. It is hardly a "windfall" to be deprived of potentially exculpatory evidence of a kind that would not only negate the test results obtained by the police, but negate police testimony as to a defendant's intoxication as well. The prosecutor argues that had the evidence been suppressed, rather than the case dismissed, this case could have gone forward on the basis of Officer Daniel's observations of Mr. Anstey alone.

(Appellant's brief at 13.) This statement only serves to underscore how the entire proceeding would have been tainted by depriving Defendant Anstey of a critical, and statutorily mandated, defense tool for which there is no comparable alternative.

Judge Butzbaugh noted at the conclusion of his written opinion that the Michigan Legislature has amended MCL 257.625a(6)(d) at least *nine times* since our Supreme Court decided *People v Koval* in 1963, and that the Legislature must be presumed to be aware of decades of case law[10] ordering the remedy of dismissal when a motorist is deprived of independent testing by a person of his choosing and where no second test is ever conducted, and he cited *People v Cathey,* 261 Mich App 506, 513 (2004). [Opinion at 104a.]

Seizing on Judge Butzbaugh's reference to "legislative acquiescence" (Opinion at 103a), the prosecutor argues that this Court has rejected that principle, citing *People v Hawkins, supra.* (Appellant's brief at 18-19.) While the brief reference to "legislative acquiescence" is hardly central to Judge Butzbaugh's opinion, the reference is, nonetheless, an appropriate one. The

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[10] See *People v Koval, supra* at 459 [appropriate remedy was dismissal of the charges where motorist not afforded opportunity for independent test]; *People v Prelesnik, supra* at 181 ["If defendant was denied the right to an independent chemical test, dismissal of the charges is the appropriate remedy"]; *People v Willis,* 180 Mich App 31, 37 (1989) ["If defendant Collopy's so-called chemical rights under the statute were violated, then the court can dismiss the charges against him."]; *People v Hurn,* 205 Mich App 618, 620 (1994) [distinguishing between violation of an administrative rule and deprivation of the opportunity to obtain exculpatory evidence, and finding that dismissal is an appropriate remedy where a defendant is deprived of the opportunity to obtain exculpatory evidence through independent testing]; *People v Underwood,* 153 Mich App 598, 600 (1986) [the charge was dismissed because the defendant was "deprived of an opportunity to obtain exculpatory evidence by an independent test" and police "respect for the statutory right should be given willingly"]; *People v Burton, supra* at 207 [defendant was deprived of "a reasonable opportunity to gather competent evidence for his defense, as contemplated by the statute"]; *People v Kuiper* (#207683, unpublished opinion of August 17, 1999) [because the purpose behind the statute, that blood evidence not be at the sole disposal of either party, was violated, the case was dismissed]. (24b-26b.)

Court's point in *Hawkins* is that a court should look to the plain language of a statute, and where the language *is* plain, legislative intent should be determined according to the words of the statute itself, and not by some period of legislative silence labeled "legislative acquiescence." *Id.* at 507. But the case before this Court today is not governed by the *Hawkins* admonition as to legislative acquiescence because, as the prosecutor concedes, the instant statute does not address the question of remedy at all. It defies common sense to suggest that a court is precluded from observing that in the face of more than forty years of judicial decision-making the Legislature could have added a remedy provision to MCL 257.625a(6)(d) had it concluded that a common judicially-imposed remedy was inconsistent with the intent of the statute. While it may be difficult to "reach sound conclusions from legislative inaction," [see Justice Boyle's concurring opinion in *People v Wood,* 450 Mich 399, 409 n5 (1995)], it is entirely proper to note the existence of that legislative inaction.

CONCLUSION

MCL 257.625a(6)(d) embodies the constitutional due process right to present a defense. While the text of that statute does not specify a particular remedy, the remedy provided here is consistent with the intent of the Legislature, its purpose in enacting the statute and the need to alleviate the harm to Mr. Anstey, which no remedy short of dismissal could do under the facts of this case. The trial court did exactly what it should have done: it followed appellate law. This Court should not repudiate the remedy it imposed in *People v Koval, supra.* The prosecutor reads *Koval,* inaccurately, to mandate dismissal for every violation of MCL 257.625a(6)(d). There is in fact a range of appropriate remedies, but where the police deliberately and calculatingly deprive an accused of independent testing under circumstances where there is no

alternative means of obtaining comparable evidence, dismissal is not only the appropriate, but the constitutionally mandated, remedy.

SUMMARY AND RELIEF

WHEREFORE, Defendant-Appellee Mark Anstey moves this Court to uphold the rulings of the Michigan Court of Appeals and the Berrien County Circuit Court and affirm the dismissal of the case.

Respectfully submitted,

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